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No. 80—

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PEABODY COAL COMPANY,
Petitioner

v.

JAMES A. WATT, SECRETARY OF THE INTERIOR

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The Surface Mining Act declares that "the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States." The Act accordingly gives the state regulatory authority, acting under a program approved by the Secretary of Interior, the exclusive responsibility to issue coal mining permits; the Act also specifies the information to be included in a coal mining permit application submitted to the state agency regulatory authority. The Secretary has promulgated 33 double-columned pages of uniform, nationwide regulations amplifying the statute and prescribing in massive detail the information that an applicant for a coal mining permit must furnish to the state authority.

The question presented is whether the Act authorizes the Secretary to require a state to adopt his Federal regulations prescribing in detail the information which must be submitted in a permit application in order for the state to obtain approval of its program and to be able to exercise its exclusive statutory responsibility of issuing coal mining permits.

PARTIES BELOW

The parties to this proceeding when it was decided on the merits by the *en banc* court below are those indicated by the caption * and the National Wildlife Fed-

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* All of the outstanding stock of Peabody Coal Company is owned by Peabody Holding Company, Inc., the stock of which is owned by—

Newmont Mining Corporation (27.5%)
The Williams Companies (27.5%)
Bechtel Corporation (15%)
The Boeing Company (15%)
Fluor Corporation (10%)
The Equitable Life Insurance Society of the United States (5%).

eration.** Additional parties in closely related litigation in the courts below, who also have an interest in the outcome of this proceeding, are:

The State of Illinois
The Commonwealth of Virginia
American Mining Congress
National Coal Association
Pennsylvania Coal Mining Association
The Dow Chemical Company
R & F Coal Company

** Joined by Counsel for Appalachian Coalition, Council of the Southern Mountains, Inc., Northern Plains Resource Council, Natural Resources Defense Council, Inc., Illinois South, and Texas Committee on Natural Resources.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES BELOW	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS	2
STATEMENT OF THE CASE	2
1. The Industry	2
2. The Act	3
3. The Regulations	5
4. Judicial Review	5
5. The *En Banc* Decision Below	6
6. State Programs	9
REASONS FOR GRANTING THE WRIT	10
A. The Issue Is Of First Importance	10
1. Economic and Administrative Dislocations	10
2. The Federal Structure	11
3. The Judgment of "the Secretary"	13
B. There Can Be No Conflicting View	14

TABLE OF CONTENTS—Continued

	Page
C. The Decision Below Is Wrong	14
1. The Text of the Act	14
2. Deference to the Agency	15
3. The Rulemaking Provisions	16
a. § 201(c)	16
b. § 501(b)	17
4. Congressional Intent	18
5. Common Sense	19
6. In Sum	20
CONCLUSION	20

TABLE OF AUTHORITIES

Cases: Page

Citizens to Save Spencer County v. *EPA*, 600 F.2d 844 (D.C. Cir. 1979) 7, 12

E. I. du Pont de Nemours v. *Train*, 430 U.S. 112 (1977) 16

In re Permanent Surface Mining Regulation Litigation, 13 E.R.C. 1586 (D.D.C., August 21, 1979) (denying petitioner's motion for preliminary injunction) ..... *passim*

In re Surface Mining Regulation Litigation, 617 F.2d 807 (D.C. Cir. 1980) (affirming denial of preliminary injunction) ..... *passim*

In re Permanent Surface Mining Regulation Litigation, 14 E.R.C. 1083 (D.D.C., February 26, 1980) (denying petitioner's motion for partial summary judgment) ..... *passim*

In re Permanent Surface Mining Regulation Litigation, 14 E.R.C. 1813 (D.C. Cir. July 10, 1980) (panel decision) ..... *passim*

In re Permanent Surface Mining Regulation Litigation, 15 E.R.C. 1802 (D.C. Cir., April 1, 1981) *(en banc)* ..... *passim*

Indiana v. *Andrus*, 501 F.Supp. 452 (S.D. Ind. 1980), *ordered stayed pending disposition of appeal*, 14 E.R.C. 1785 (U.S. Sup. Ct., July 2, 1980) and *appeal pending, Andrus* v. *Indiana*, No. 80-231 (U.S. Sup. Ct.) 11

Meadowlark Farms, Inc. v. *Indiana Department of Natural Resources*, No. C80-1952 (Marion Cty. Cir. Ct., July 29, 1980) 9

Virginia Surface Mining and Reclamation Ass'n, Inc., v. *Andrus*, 483 F.Supp. 425 (W.D. Va. 1980), *order stayed pending disposition of appeal*, 14 E.R.C. 1149 (U.S. Sup. Ct., February 25, 1980) and *appeal pending, Andrus* v. *Virginia Surface Mining and Reclamation Ass'n*, Nos. 79-1538 *et al.* (U.S. Sup. Ct.) 11

TABLE OF AUTHORITIES—Continued

Statutes and Regulations:		Page
Surface Mining Control and Reclamation Act of 1977, 91 Stat. 445, 30 U.S.C. § 1201, *et seq.*		
Sections	101	7, 14
	201(c)	7, 16, 17
	501(b)	7, 9, 17
	502	4, 15
	503	4, 15, 19
	503(a)	9
	503(c)	4
	503(d)	9
	504	4, 15
	504(a)	9
	505(a)	15
	507	4, 7, 15
	508	4, 7, 15
	515	5
	516	5
	517	5
	518	5
	520	5
	521	5
	523	15
	526(a)(1)	5, 14
	701(22)	4
Surface Coal Mining and Reclamation Regulations—Permanent Regulatory Program, 30 C.F.R. § 700, *et seq.* (1980)		
Parts	778	5
	779	5
	780	5
	782	5
	783	5
	784	5
	816.117(b)(1)	12
28 U.S.C. § 1254(1)		2

TABLE OF AUTHORITIES—Continued

Other Authorities:	Page
U.S. Department of Interior, Draft Environmental Statement, Permanent Regulatory Program Implementing Section 501(b) of the Surface Mining Control and Reclamation Act of 1977 (1978)	3
U.S. Department of Interior, Draft Regulatory Analysis for Permanent Regulatory Program of the Surface Mining Control and Reclamation Act of 1977 (Sept. 1978)	3
H.R. Rep. No. 1072, 93d Cong., 2d Sess. 121-122 (1974)	3
H.R. Rep. No. 218, 95th Cong., 1st Sess. 140-141 (1977)	3, 18
44 Fed. Reg. 15312 (1979)	5, 9
44 Fed. Reg. 15353-15370 (1979)	5
44 Fed. Reg. 45605-45607 (1980)	6, 9
Fed.R.Civ.P. 54(b)	6
Fed.R.App.P. 40(a)	6

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OPINIONS BELOW

The opinion of the District Court denying petitioner's motion for preliminary injunction [App. F, 148a, 176a-187a] [1] is reported at 13 E.R.C. 1586. The opinion of the Court of Appeals affirming that denial [App. E, 144a-147a] is reported at 617 F.2d 807. The opinion of the District Court denying relief on the merits [App. D, 73a, 101a-105a] is reported at 14 E.R.C. 1083. The opinion of the panel of the Court of Appeals reversing that decision [App. C, 48a-72a] is reported at 14 E.R.C. 1813. The opinion of the Court of Appeals *en banc*, affirming the District Court [App. A, 1a-45a], is reported at 15 E.R.C. 1802.

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[1] Citations to "App." refer to a separate appendix which accompanies the instant petition pursuant to Rule 21(k) of this Court.

JURISDICTION

The judgment [App. I, 291a] and opinion of the Court of Appeals *en banc* were entered on April 1, 1981. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

There are set out in the Appendix to this Petition the following provisions:

Surface Mining Control and Reclamation Act of 1977, 91 Stat. 445, 30 U.S.C. § 1201, *et seq.* [App. G, 188a-205a].

Sections 101
102
201(a)
201(c)
501(b)
505
506(a)
507
508

Surface Coal Mining and Reclamation Regulations—Permanent Regulatory Program, 30 C.F.R. § 700, *et seq.* (1980) [App. H, 206a-290a].

Parts 778
779
780
782
783
784

STATEMENT OF THE CASE

1. *The Industry.* The record pertaining to the rules at issue shows that the Nation has coal reserves in 37 states and over 6000 operating mines. Of these, approxi-

mately 3700 are surface mines, accounting for 57 per cent of the 679 million tons of coal produced annually.[2]

Most of the surface coal mines are small, typically located in the eastern United States. Others, typically in the western states, are very large. The rulemaking record also shows that surface coal production is distributed according to mine size as follows: [3]

Annual Production (tons)	Number of Mines	Per Cent of Total Production
0-100,000	315	21
100,001-500,000	466	22
500,001-1,000,000	51	10
over 1,000,000	72	47
	3739	100

2. *The Act.* The Surface Mining Act, after a prolonged legislative effort,[4] was enacted on August 3, 1977. It generally confers the Federal authority upon the Secretary of the Interior ("the Secretary") and in Title II creates the Office of Surface Mining Reclamation and Enforcement ("OSM") through which the Secretary shall ordinarily act.

The Act contemplates a separate "interim" phase of the regulatory program, with hybrid state-federal administration for the period prior to the permanent program. Coal mining continues under the existing permits issued under the traditional authority of the states, but subject

[2] U.S. Dept. of Interior, Data from Draft Environmental Statement, Permanent Regulatory Program Implementing Section 501(b) of the Surface Mining Control and Reclamation Act of 1977 (1978), pp. B-II-2.

[3] U.S. Dept. of Interior, Draft Regulatory Analysis for Permanent Regulatory Program of the Surface Mining Control and Reclamation Act of 1977 (Sept. 1978), p. 11.

[4] It was considered from the 90th through the 95th Congress, including two presidential vetoes. The general course of the legislative history is given in H.R. Rep. No. 1072, 93d Cong., 2d Sess. 121-122 (1974), and H.R. Rep. No. 218, 95th Cong., 1st Sess. 140-141 (1977).

to certain performance standards prescribed and enforced by the Secretary. § 502.

The administration of the permanent program is to commence with the preparation and submission of a regulatory program by each coal-producing state. This is to be approved or disapproved, after public hearing, by the Secretary pursuant to criteria specified in the Act. § 503. These, generally, require a showing of effective administration and consistency with the Surface Mining Act and the Secretary's regulations. If disapproved, the state has opportunity to submit a revision for the Secretary's approval. § 503(c). If the state does not submit a program, or if it is disapproved, then the Secretary shall after notice and public hearing promulgate a "Federal program" for the state, to be effective until the state should have submitted a state program which is approved by the Secretary. § 504.

The Act in many areas speaks of the administering body as the "regulatory authority." This is the appropriate state agency where there is an approved state program, and is the Secretary where a Federal program is in force for that state. § 701(22). We do not here complain of the regulations insofar as they might govern the administration of the Act under a Federal program, or in respect of Federal lands, but address only their application to what was expected to be the usual situation, a state "regulatory authority" acting in respect of private lands pursuant to state law and with the Secretary's approval of the state program.

Coal mining can be conducted only under a permit, not to exceed five years in term, issued by the regulatory authority. § 506. The mine operator must submit with his permit application a great deal of financial, operating and environmental data, § 507, as well as correspondingly detailed information as to the reclamation plan. § 508. The Act grants the Secretary no authority to

review or revise the action of a regulatory agency in granting or denying a permit.

Section 515 enacts a very elaborate series of "performance standards" designed fully to protect the environment in all aspects of surface coal mining and reclamation. These are also to be applied by the Secretary's regulations to the surface effects of underground coal mining, bearing in mind "the distinct difference between surface coal mining and underground coal mining." § 516.

A system of inspections, penalties and enforcement orders is provided; in general these are the responsibility of the state regulatory authority but subject to monitoring and supervision by the Secretary. §§ 517, 518, 521. Any citizen adversely affected may file complaint to compel compliance with the Act. § 520.

3. *The Regulations.* The Secretary issued the permanent regulations on March 13, 1979. 44 Fed. Reg. 15312 (1979). They make up a 431-page portion of Title 30 of the *Code of Federal Regulations.* Parts 778-780 and 782-784 of the permanent regulations prescribe in prodigious detail the information required to be submitted with an application for a mining permit. [App. H, 206a-290a.] These six parts occupy 18 triple-column pages of the *Federal Register*, 44 Fed. Reg. 15353-15370 (1979), and 33 pages of the double-columned 30 C.F.R. (Part II at pages 457-489). Our count indicates that there are 243 textual paragraphs demanding information in respect of surface mining operations and 257 in respect of surface effects of underground mining.

4. *Judicial Review.* Section 526(a)(1) of the Act provides that national rulemaking by the Secretary shall be subject to review in the United States District Court for the District of Columbia within 60 days of his action. Six industry groups or companies and an environmental group challenged about 100 of the separate provisions of the permanent regulations. Something over half of

the issues raised by the industry and the states resulted, by concessions of the Secretary *pendente lite* or by decision of the District Court, in suspension or remand of the regulations. 45 Fed. Reg. 45605-45607 (1980) (listing 62 regulations suspended in light of litigation pertaining to permanent regulations). Twenty-nine issues were appealed to the court below.[5] Briefing would have been completed in March had the Secretary not requested extensions of time for the final brief.

The issue raised here has at many stages been presented and decided separately from the general review proceeding, owing largely to the exigencies of time. Thus it was first presented to the District Court on motion for preliminary injunction, which it denied [App. F, 148a, 176a-187a]; the Court of Appeals affirmed [App. E, 144a-147a]. District Judge Flannery ruled against us in the "First Round" decision on the merits [App. D, 73a, 101a-105a] but by order under Rule 54(b), F.R.Civ.P., allowed separate appeal of this issue. It was given expedited attention by the panel already familiar with the issue on preliminary injunction. The panel decision of July 10, 1981, reversed Judge Flannery [App. C, 48a-72a]. The Secretary's petition for *en banc* rehearing was granted, and the panel decision vacated, without opportunity for reply by petitioner. [App. B, 46a-47a; *cf.* Federal Rule of Appellate Procedure 40(a)]. The *en banc* Court affirmed the District Court by a vote of 7-4, after briefs and arguments for both parties. [App. A, 1a-45a.]

5. *The En Banc Decision Below.* Petitioner premised its challenge to the Secretary's regulations pertaining to permitting information on the grounds, *inter alia*, that (i) the Surface Mining Act in terms affords the states the "primary governmental responsibility for developing, au-

[5] Appeals were taken by industry as to 9 issues, by the states as to 11, by the Secretary as to 8 and by the environmental group as to 7 [non-additive because of double appeals on same issues].

thorizing, issuing and enforcing regulations for surface mining and reclamation operations . . . ." (§ 101(f)); (ii) the Act affords the state regulatory authorities exclusive jurisdiction over the issuance of coal mining permits without review or revision by the Secretary and with judicial review in state courts; and (iii) §§ 507 and 508, which specify the permitting information to be submitted with regard to a coal mining permit, repeatedly refer to the "regulatory authority"—*i.e.*, the states when acting under approved state programs—as the body responsible for overseeing the collection of permit information and do not once refer to the Secretary.

Judge Mikva, writing for the majority below, acknowledged that "the Act contemplates a continuing partnership between the states and the federal government, with the Secretary providing oversight, advice, and back-up authority, and the states bearing the major responsibility for the implementation of the Act." [App. A, 2a.] He further acknowledged that "the state is the sole issuer of permits. In performing this centrally important duty, the state regulatory authority decides who will mine in what areas, how long they may conduct mining operations, and under what conditions the operations will take place." [App. A, 8a.] He also agreed that a general rulemaking grant " 'does not provide the [agency] with *carte blanche* authority to promulgate any rules, on any matter that the [agency] wishes.' " [App. A, 18a (quoting *Citizens to Save Spencer County* v. *EPA*, 600 F.2d 844, 873 (D.C. Cir. 1979))]. But, he nevertheless affirmed the District Court on the grounds (a) that the Secretary had interpreted two general rulemaking provisions within the Surface Mining Act—§§ 201(c)(2) and 501(b)—as affording the Federal government the right to dictate permitting information procedures to the states and (b) that the Secretary's interpretation had to be afforded deference by the Court of Appeals. [App. A, 16a-18a.] The primary authority of the state, he said,

came into play only after the state program, conforming to the Secretary's detailed requirements, had been approved. [App. A, 24a-28a.]

Judge Tamm, writing for the minority, found nothing within the Act's general rulemaking provisions to grant the Secretary authority to write regulations in this area, [App. A, 33a-35a], and went on to observe "that Congress intended to vest in the states primary regulatory and decisionmaking authority and to place the Secretary in an oversight role to ensure that the states provide some minimal level of regulation and control." [App. A, 37a.] He further found that "the Act itself defines the minimum information permit applications must contain and that the Secretary's authority in this area is limited to determining whether the states have satisfied the minimum." [App. A, 37a.] Based on these findings, he concluded that "the Secretary lacks power to demand that states require more information from applicants than the Act itself spells out." [App. A, 37a.] He stated further that the majority's reasoning "would turn Congress's scheme on its head [by] allow[ing] supervisory authority to consume state discretion and to reduce state power to a purely ministerial implementation of a [F]ederally devised program." [App. A, 42a.]

Judge MacKinnon, in a separate concurring dissent, concluded that allowing "the Secretary's overly comprehensive regulations to preempt the authority of the states to act in the first instances, would as a practical matter, operate to stifle the activity of all the states in their handling of what Congress has indicated to be largely local state problems. Congress did not express an intent to so limit the authority of the states." [App. A, 44a.] He found "the Secretary's regulations [to] smother all state initiative" in that they "overly expand[] an *oversight* role into a role that permits the Secretary to *formulate* organizational and *operational* rules for the states. This is

a great deal more than 'oversight.'" [App. A, 44a (emphasis in original).]

6. *State Programs.* There has been a history of confusion and delay in the submission and approval of state programs[6] but as of January 1981, the final statutory date, some 16 states had submitted programs to which the Secretary had given either final or conditional approval.[7]

So far as the existing formal requirements go, each of the thousands of mines in these 16 states have been required to submit by March 1981 permit applications in conformity with state programs which have, perforce, copied the massive requirements of the Secretary's regulations. The issue is not, however, moot as to them, since, perfection being impossible, there will inevitably be many deficiencies in their submissions the treatment of which will turn upon the final decision here. The issues, in any event, remain live as to permit applications to be filed for

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[6] The Secretary was required to issue the permanent regulations by August 3, 1978. § 501(b). They were in fact issued on March 13, 1979. [44 Fed. Reg. 15312.] The delay in promulgating the final regulations in the end pushed the time for final action on state programs from April 1980 to January 1981. For example, the state programs were to be submitted on August 3, 1979, §§ 503(a), 504(a), but, because of the tardy regulations, the District Court below enjoined enforcement of the submission date before March 3, 1980. [App. F, 152a-161a.] After a number of state programs had been submitted, that court, by decision or by recognition of the Secretary's concessions, held 62 provisions of the regulations invalid. See, *e.g.*, 45 Fed. Reg. 45605-45607 (1980). Because the ongoing litigation over the permanent regulations led to great uncertainty as to the scope of state programs, state court injunctions have been entered against the submission of programs by 8 states. See, *e.g.*, Judgment, *Meadowlark Farms, Inc.* v. *Indiana Dep't of Nat. Resources*, No. C80-1952 (Marion Cty. Cir. Ct., July 29, 1980); see also § 503(d).

[7] Listing supplied petitioner by the Assistant Solicitor for Government Relations, Division of Surface Mining, Department of Interior, on March 24, 1981.

the opening of new mines in these states. Moreover, the issue remains wholly alive for the thousands of mines in the other 18 coal producing states which have not as yet submitted permanent programs.[8]

REASONS FOR GRANTING THE WRIT

A. *The Issue Is Of First Importance*

1. *Economic and Administrative Dislocations.* It is hardly necessary to document the nation's dependence upon coal as an energy source, or to prove the inflationary impact of a disproportionate increase in the price of coal. In order to continue in operation, each of the Nation's 6000 mines will need a permit. The record before the District Court below demonstrated that petitioner's compliance with the regulations in question alone would cost (in 1979 dollars) about $10 million, or an average of over $200,000 a mine; the applications for each mine may be expected to run about 1500 pages with 75 appendices.[9] The resulting application would be approximately 15 inches thick.[10] If petitioner's expectations were typical, the Kentucky Department of Natural Resources, for example, would have to review during the initial stages of the permanent program about 3.5 million pages which would stack over one-half mile high.[11] These eco-

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[8] Georgia, Washington and Alaska have elected not to submit a state program, and to accept complete federal regulation. *See* Gov't Br., *Andrus* v. *Virginia Surface Mining and Reclamation Ass'n*, Nos. 79-1538, *et al.* (November 1980) at p. 6, n.9.

[9] Annex B (Affidavit of Floyd E. Matthews) and Annex C (Affidavit of James R. Jones) to Certain Industry Plaintiffs' Motion for Preliminary Injunction, *In re Permanent Surface Mining Regulation Litigation*, C.A. No. 79-1144 (D.D.C., June 25, 1979).

[10] *Id.*

[11] To be sure, the problem has been eased somewhat by relief afforded the operators by rulings in a handful of the permitting information regulations in the District Court below. [App. A, 6a, n.4; App. F, 186a-187a.] Most of these limited rulings, however, have been appealed by the Government to the Court of Appeals.

nomic and administrative problems would be eased in every case, and eliminated in some, if the state regulatory authority were authorized to prescribe the information requirements appropriate to the terrain, hydrology and climate of that state, instead of administering a Federally dictated information-gathering program which requires from every mine in the country the aggregate of *all* the particular bits of information which might reasonably be required in respect of one individual mine or another.[12]

2. *The Federal Structure.* As this Court knows from its recent consideration of the Constitutional issues pertaining to the Act, this statute is a land-use provision, and as such pushes more deeply into an area of traditional state authority than any other Act of Congress known to us.[13] The majority below went to great lengths

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[12] The majority below chastised our reference to the economic and administrative dislocations caused by the Secretary's massive requirements by contending that the permitting sections within the Act "are also massive" and that petitioner nowhere "estimates the expense or quantity of paper that would be consumed if the Secretary had promulgated the statutory provisions verbatim as his regulations." [App. A, 6a, n.5.] Suffice it to say, that the Act's 5-page detailed recitation of the permitting information to be required by the regulatory authority has been swelled by the Secretary to 33 double-columned pages in the *Code of Federal Regulations*. Compare App. G, 196a-205a with App. H, 206a-290a. This suggests, though hardly precisely, that 28/33 of our complaint would be assuaged.

[13] See *Indiana* v. *Andrus*, 501 F.Supp. 452 (S.D. Ind. 1980), *ordered stayed pending disposition of appeal*, 14 E.R.C. 1785 (U.S. Sup. Ct., July 2, 1980) and *appeal pending*, *Andrus* v. *Indiana*, No. 80-231 (U.S. Sup. Ct.); *Virginia Surface Mining and Reclamation Ass'n, Inc.* v. *Andrus*, 483 F.Supp. 425 (W.D. Va. 1980), *order stayed pending disposition of appeal*, 14 E.R.C. 1149 (U.S. Sup. Ct., February 25, 1980), and *appeal pending*, *Andrus* v. *Virginia Surface Mining and Reclamation Ass'n*, Nos. 79-1538 *et al.* (U.S. Sup. Ct.).

to find that the Act and its history suggest a carefully balanced concern for national environmental standards, for primary administrative responsibility in the state agencies, and for Federal oversight powers to ensure that the state agencies were doing their job. [App. A, 11a-13a.] However, the majority opinion [App. A. 14a-23a] allows the Secretary, by virtue of the Act's general rulemaking provisions alone, to draw the dividing line between his own powers and that of the states wherever he will. Since the state can administer a program only after its approval by the Secretary, this to the Court below means that the Federal agency can prescribe without limitation the requirements for approval of a state program, even if, as with the permit information requirements, it converts the state "primacy" into the ministerial function of copying off and then applying federal regulations. A rather vivid example is the Secretary's rule that land reclaimed for woodland shall have 450 trees or shrubs per acre [30 C.F.R. § 816.117(b)(1) (1980), which has no variance power]; the state agency can copy that requirement and then count the trees. As Judge Tamm concluded in his dissent, the majority has "reduce[d] state power to a purely ministerial implementation of a [F]ederally devised program." [App. A, 42a.]

Judge Mikva sought to assuage the fears of petitioner and the minority that there are, under the majority's reading of the Act, no bounds to the Secretary's powers by contending that the rulemaking provisions within the Act do "'not provide the Administrator with *carte blanche* authority to promulgate any rules, or any matter relating to the . . . Act.'" [App. A, 18a *(quoting Citizens to Save Spencer County* v. *EPA, supra)*]. But we cited this very case below to the Court to show that, even in the case of permitting information, general rulemaking powers standing alone do not give the Secretary authority

to invade a prerogative assigned by the Act to the states. If the Secretary can preempt the state in its permitting information responsibility, we fail to see the neutral principle of law which would bar the Secretary from invading all other state prerogatives. Indeed, as the litigation below demonstrates, the Secretary has, in fact, by virtue of his 431 pages of regulations, left almost nothing to the discretion of the states for purposes of this Act.

3. *The Judgment of "the Secretary."* Judge Mikva relied almost exclusively on the Secretary's construction of the Act's general rulemaking powers as a basis for validating the regulations. [App. A, 14a-23a.] While this canon of statutory construction has merit in instances where the Secretary is defining his *own* statutory powers, it is, we believe, unprecedented to afford the Secretary deference to expand his own powers at the cost of the states when, as the majority concedes, the Act makes "the state . . . the sole issuer of permits." [App. A, 18a.]

This then is not a situation where a court is deferring to an agency on grounds of the latter's technical expertise, but, instead, the Court gives dispositive deference to the Secretary on a sensitive intergovernmental issue of policy, which, as this Court can surely take notice, went to the very heart of the political debate in the last National election. In short, the majority has gone some distance toward accepting and the freezing into the statute a policy judgment made and promulgated by a Secretary who was no longer in office when the majority's decision was reached. That judgment is now the interpretation of the Act, and therefore ascribed to the same Congress which in terms provided that "the primary governmental responsibility for developing, authorizing, issuing and enforcing regulations for surface mining and reclamation operations subject to this Act should rest

with the States." § 101(f). The majority's result, at best, seems to be highly artificial.

B. *There Can Be No Conflicting View*

The Secretary's "national" regulations are subject to review *only* in the District of Columbia. § 526(a)(1). This issue can, therefore, arise in no other circuit.

The eleven active judges of the United States Court of Appeals for the District of Columbia have divided sharply. This of itself demonstrates that there is no ineluctable logic, nor yet any unmistakable accumulation of indicia, to compel a result either way. None can doubt that another court of appeals might have produced a majority going the other way. We suggest that an issue of the importance and the delicacy of this one ought not to be decided upon the essentially fortuitious grouping of judges in a single intermediate court.

C. *The Decision Below Is Wrong*

We do not conceive that this petition is the place to argue the merits of this protracted controversy. It is enough, for an issue of the importance and delicacy of this one, that the court below was not incontestably right. The very fact of the dissent, to say nothing of the force of its reasoning, shows that the issue is open to very real doubt. We nevertheless, out of a caution appropriate to the occasion, make a very summary showing that the decision of the majority was wrong.[14]

1. *The Text of the Act.* We have always thought that, in determining the agency to which the Congress has as-

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[14] We have also severe complaint that the majority repeatedly misstates, sometimes slightly and sometimes significantly, the position of the petitioner. See, *e.g.*, App. A, 5a, 6a, 11a, 14a, 17a, 18a, 19a, 21a, 22a, 25a. We do not develop our complaint because, however distasteful to counsel, it is hardly ground for *certiorari*.

signed the permit information powers, it would be useful to look to the text of the Act. We implored the court below to make a comparative reading of Title V of the Act. Had it done so it would have found that §§ 506-514 and 519, dealing with permitting and bonding, including the information requirements of §§ 507 and 508, make repeated reference to "the regulatory authority," some 101 instances in all. There is *no* reference to the Secretary. By way of emphasis, § 508(a)(14) calls for such additional permit information "as the regulatory authority shall prescribe by regulations." In contrast, the *Federal* functions covering the interim program [§§ 501-502], the approval of state programs [§ 503], the promulgation of a Federal program for a state without an approved program [§ 504] and federal lands [§ 523] contain repeated references to the responsibilities of the Secretary, 45 in all, and virtually none, 3 in all, to the "regulatory authority." We do not know how an argument could be framed to explain away this clear, specific and discriminating distribution of authority by the very text of the Act. We speculate that the majority, too, saw no way to deal with this textual pattern. In any case, it found no room in its 28-page opinion even to mention the statutory text.[15]

2. *Deference to the Agency.* We have already noted above the inappropriateness of resolving the issue presented by deferring to the outgoing Secretary's construction of the Act's general rulemaking provisions. We

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[15] We should also note that the Act in terms provides that "[n]o state law or regulation . . . shall be superseded by any provision of this Act or any regulation issued pursuant thereto, *except insofar as such state law or regulation is inconsistent with the provisions of the Act.*" § 505(a). The majority's ruling has the effect of invalidating state laws and regulations which are consistent with the Act, but *inconsistent with the Secretary's regulations.* For this reason, as well, the majority's opinion squarely conflicts with the statute in question.

would add that the Secretary's reliance upon the standard cases showing that deference is due the agency's interpretation of its own statute [App. A, 16a-18a] founders upon the Court's failure to recognize that the question presented is *which* agency, Federal or state, has been charged with the administration of this part of the Act? Until that is known, one cannot tell to which agency deference is owed.

The weakness in the majority's reasoning on this issue is most dramatically evidenced by its reliance upon *E.I. du Pont de Nemours* v. *Train*, 430 U.S. 112 (1977), where this Court attached incidental significance to a general grant of rulemaking authority in the Clean Water Act to sustain regulations prescribing specific effluent limitations rather than awaiting case-by-case decision on 42,000 applications. That case, however, presented no issue of state versus Federal responsibility. While, under the Water Act, EPA may, if it so chooses, delegate permit authority to a state agency, the permitting decisions remain, as the Court expressly stated [430 U.S. at 137], a federal responsibility: *i.e.*, permitting applications are filed also with EPA which can revise or reverse the state agency. Even the majority below clearly recognized this distinction when it said:

> "The independence of a state administering an approved state program under the Surface Mining Act may be contrasted with the *continuing* role of the [EPA] after a state has assumed responsibility for pollution discharge permits under the [Water Act]. The EPA Administrator retains veto power over individual permit decisions under that statute, ..." [App. A, 9a, n.7 (emphasis added).]

3. *The Rulemaking Provisions.* The general rulemaking provisions within the Act, in and of themselves, do not provide for the sweeping authority the former Secretary gathered to himself here.

a. § *201(c)*. This provision, found in the housekeeping section establishing OSM, gives the Secretary author-

ity to "promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act." The majority's reliance upon § 201(c) as a source of Federal power to dictate to states the way in which they should carry out their statutorily assigned responsibilities amounts to question-begging since the exact issue here is whether the regulation *is* consistent with "the purposes and provisions of the Act" [App. A, 18a-19a]. It is especially strange that so much importance should be attached to this provision since we have not found a single reference to § 201(c) in the legislative history during the seven years that Congress considered this statute.

b. *§ 501(b).* This section, reduced to the essentials of the current debate, authorizes regulations—

> "establishing procedures and requirements for preparation, submission and approval of state programs; and development and implementation of Federal programs . . . ."

The majority below "recognize[s] that the language of section 501(b) is not entirely lucid," but finds that this provision, in light of "the Secretary's reading," confirms in the Federal government a plenary rulemaking authority over all matters to be found in a state program; this is on the theory that the Secretary can by rulemaking advise what kind of state programs he will approve. [App. A, 20a-23a.] This argument, giving the Secretary unlimited power to impose any regulations he chooses, confuses the power to approve with the power to prescribe. Indeed, it cannot be reconciled with § 501(b) itself. Surely, the power to establish "procedures and requirements for preparation, submission and approval of state programs" is narrower than the power of the "development and implementation" given in respect to Federal programs. The majority ignores this contrast in language, but Judge MacKinnon in his dissent correctly

states that "the majority has overly expanded an *oversight* role into a role that permits the Secretary to *formulate* organizational and *operational* rules for the states. This is a great deal more than 'oversight.'" [App. A, 44a (emphasis in original).]

4. *Congressional Intent.* The majority attempts to buttress its resolution of the issue by pointing to passages in the legislative history which show Congressional dissatisfaction with state mining regulation practices in existence at the time the Act was passed. [App. A, 11a-13a.] But, a critical examination of both the majority's analysis and the legislative history makes clear that Congress intended to remedy that problem by legislating ten pages of environmental performance standards which must be met within each state, 91 Stat. 486-495, and five pages of permitting information which state regulatory authorities must gather from operators. 91 Stat. 474-479. In short, Congress in drafting this statute with great precision left to chance no matter of consequence when it in terms placed the "primary governmental responsibility" in the hands of the states. § 101(f).

We do not dispute that state responsibilities were to be monitored, as the majority's citations to the legislative history make clear, by " 'a *limited Federal oversight role* as well as increased opportunity for citizens to participate in the enforcement program . . . .' [App. A, 12a (quoting from H.R. Rep. No. 218, 95th Cong., 1st Sess. 129 (1977)]. But that "limited" role was not to be in the form of 431 pages of double-columned Federal "regulations [which] practically smother all state initiative." [App. A, 44a.] [16]

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[16] Indeed, Judge Tamm, in his dissent, correctly outlined the general contours of the Federal government's role as follows:

". . . . [I]f a state fails to abide by its responsibilities under the Act, the Secretary may enforce the Act against particular

The majority's reading of the Act also defies its own acknowledgment that "the Act contemplates a continuing partnership between the states and the federal government, with the Secretary providing oversight, advice, and back-up authority, and the states bearing the major responsibility for implementation of the Act." [App. A, 2a.] The regulations at issue and the majority opinion have converted that "continuing partnership" into the relationship that a vassal has with his king.

5. *Common Sense.* It is agreed by all that the state regulatory authority has the exclusive power to grant or deny a mining permit, without review or revision by the Secretary, and with judicial review in the state courts. The majority quoted what it called our "most significant argument":

> "The Congress cannot reasonably be supposed to have created an administrative structure so bizarre that the agency which has the exclusive power to decide the issues is powerless to determine the information which it needs to reach that decision." [App. A, 24a.]

The majority thought the conclusive answer to this point was that the Secretary had oversight responsibility over the state programs and could specify the data necessary to exercise that authority [App. A, 24a]. This is sleight of hand by fiat. One needs only glance at the regulations to see that the information is required for permit grant or denial—a responsibility of the states—and not related at all to the wholly separate oversight machinery assigned to the Secretary.

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mines [§ 521(b)], and, after following certain procedures, assume full authority for issuing and enforcing permits within that state [*id.*]. Until such inadequate enforcement appears, however, the Secretary's actual power to compel compliance with his wishes is limited to approving state programs based on the criteria set forth in the Act [§ 503] and to monitoring success through the federal inspection systems." [App. A, 42a.]

6. *In Sum.* It seems to us clear that the majority reasoning was wrong. It is clear, moreover, that we have here a basic issue of the distribution between the Federal and the state governments of responsibility for a very broad program, which in its nature should finally be determined by the highest court rather than by a 7-4 majority of a single intermediate court.

CONCLUSION

This petition for writ of certiorari should for the reasons given above be granted.

Respectfully submitted,

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